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Daniel J. Armstrong, Jared Armstrong, Taylor Armstrong by Lorene Armstrong, his guardian ad litem v. Glen C. Pickett and John Does 1-5 : Reply Brief of Appellant

Utah Court of Appeals

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Robert H. Wilde; Wilde and Associates; Attorney for Appellees, Daniel Armstrong, Jared Armstrong, and Taylor Armstrong.

IN THE SUPREME COURT OF UTAH

DANIEL J. ARMSTRONG, JARED ARMSTRONG, TAYLOR ARMSTRONG BY LORENE ARMSTRONG, his guardian ad litem, Plaintiffs/Appellees, vs. GLEN C. PICKETT and JOHN DOES 1-5, Defendants/Appellant.	SUPREME COURT CASE No. 20010167 Civil No. 980908711 Judge Homer Wilkinson **ORAL ARGUMENT REQUESTED**

REPLY BRIEF OF APPELLANT, GLEN C. PICKETT

APPEAL FROM JUDGMENT OF THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY, JUDGE HOMER WILKINSON

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Defendant/Appellant Glen C. Pickett ("Pickett"), by and through counsel, hereby objects to Plaintiff/Appellees', Daniel Armstrong's, Jared Armstrong's and Taylor Armstrong's (hereinafter collectively referred to as "the Armstrongs") Statement of Facts and submit their Reply Brief as set forth below.

OBJECTION TO THE ARMSTRONGS' STATEMENT OF FACTS

While the Heading in the Armstrongs' Brief states that it contains relevant facts with citations to the record, several of the facts set forth therein are irrelevant to the issues on appeal and appear to be inserted for inflammatory purposes. Furthermore, several of the facts included in the Armstrongs' Brief simply restate the trial court's factual findings that are on appeal for lack of evidentiary support. Those facts should not be given any weight by this Court.

I. THE ARMSTRONGS' ARGUMENT REGARDING THE STANDARD OF REVIEW FOR EVIDENTIARY RULINGS FAILED TO ADDRESS ANY OF THE FACTUAL ISSUES IN THIS CASE

In their first point of argument, the Armstrongs correctly identify the standard of review used to evaluate a trial court's evidentiary rulings and factual findings and the impact of harmless errors. The Armstrongs, however, fail to identify any particular factual finding, or evidentiary ruling that resulted in harmless error. While Point I of the Armstrongs' Brief may be a fair statement regarding the rule of harmless error, they have failed to apply the rule to the case at hand. Since Pickett's counsel and this Court are left to guess which errors the Armstrongs claim may be harmless, or the reasons that they may be harmless, the Armstrongs' first argument cannot be responded to and should be ignored.

II. PICKETT ADEQUATELY PRESERVED THE ISSUES THAT NEEDED TO BE PRESERVED FOR APPEAL

Point II of the Armstrongs' argument contends that Pickett failed to raise several of the issues on appeal below. The only two issues that had to be raised below to preserve them for appeal, however, were: (1) whether Daniel Armstrong had standing to sue for damage to property he did not own; and (2) whether the PIP threshold requirement set forth in Utah Code Ann. § 31A-22-309(1) had to be met before the Armstrongs, individually, could pursue claims for general damages.[1] The other issues on appeal are factual issues which can be raised at any time in this case because the trial court was the fact finder.

A. Pickett Was Not Required to Raise His Objections to the Trial Court's Factual Findings in Order to Appeal Them

The Armstrongs' Brief claims that Pickett cannot challenge the Proposed Findings of Fact and Conclusions of Law, (R. 567), on appeal because his objection below does not meet the standard set forth in *Hart v. Salt Lake County Comm'n*, 945 P.2d 125, 129 (Utah Ct. App. 1997) (holding issues must be brought to a level of consciousness before the trial court to afford it an opportunity to make a ruling). Pickett's challenges to the trial court's factual findings in this case, however, are governed by Utah R. Civ. P. 52(b). It states in part:

> When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

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[1]Both issues will be dealt with separately below.

This case was tried to the court without a jury. The court's factual findings can, therefore, be challenged now, whether or not they were challenged below. The factual issues in question are:

(7) Whether Daniel Armstrong's self-serving testimony, unsupported by any medical evidence and in fact refuted by the medical evidence, that the accident aggravated a pre-existing back injury was sufficient to support the trial court's determination of his special and general damages. (Issue #3, Pickett's Initial Brief at p. 8);

(8) Whether two small, almost imperceptible, scars below Jared Armstrong's jaw-line constitute "permanent disfigurement" as that term is used in Utah Code Ann. § 31A-22-309(1) and, if so, whether those scars support the general damages awarded by the trial court. (Issue #4, Pickett's Initial Brief at p. 9);

(9) Whether the opinion of Plaintiff's expert (based upon a single evaluation conducted over three years after the accident) that Taylor Armstrong, suffered a closed head injury which might impact him in the future, without more, was sufficient to support the trial court's finding that Taylor sustained general damages of $350,000, or whether that amount is speculative and based on conjecture in light of testimony from the expert that he could not say with any degree of medical certainty what the impact of that head injury would or might be on Taylor. (Issue #5, Pickett's Initial Brief at p. 10)

Because these issues are all challenges to the sufficiency of the evidence, Pickett's objection below was sufficient to preserve them for appeal.

B. <u>The Issue of Daniel Armstrong's Standing to Sue for Damage to Personal Property He Did Not Own Was Appropriately Raised Below</u>

At the Hearing, Pickett's counsel objected to the submission of any testimony regarding the value of Lorene Armstrong's vehicle because Daniel Armstrong did not have any ownership interest in the vehicle and because that loss had already been paid for by

insurance. (R. 578 Transcript, p. 41).[2] In spite of Pickett's objection, the trial judge received evidence of the value of the vehicle. Additional evidence elicited during the hearing confirmed that the vehicle was owned solely by Ms. Armstrong, and that USF&G and Atlanta Casualty had already compensated them for the loss of the vehicle. (R. 578 Transcript, pp. 48-49.) Pickett's opposition to Daniel Armstrong's recovery for damage to property he did not own was also contained in his Damages Briefs at R. 287 and R. 535, (copies of which are attached hereto (without exhibits) as Addendum A).

C. The Issue of Pickett's Immunity from Some of Plaintiff's Tort Claims Was Also Properly Preserved on Appeal

Pickett's second issue (whether Utah Code Ann. §31A-22-309(1) provided him with partial tort immunity) was also preserved for appeal at the outset of the Damages Hearing of October 16, 2000. At the Hearing, the issue of the PIP threshold immunity from some tort claims was dealt with in detail. (R. 578 Transcript, pp. 6-19; copies of those Transcript pages are attached hereto as Addendum B). Following a detailed and extensive argument, Judge Wilkinson ruled that the partial tort immunity provided by 31A-22-309(1) was an affirmative defense rather than a threshold issue and that Pickett's default precluded him from enjoying any such immunity. (R. 578 Transcript pp. 6-19) Because the trial court ruled from the bench on this issue there should be no question that it was before the court's

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[2]A transcript of the proceedings of the October 16th, 2001, Damages Hearing ("Damages Hearing") is included in the Record starting at p. 578 and the references to that transcript will, hereinafter, be referred to as "R. 578 Transcript" followed by references to specific page numbers.

consciousness. (*See* R. 578, pg 19, where the trial judge stated, "if you take it up on appeal, then maybe you'll find out I'm wrong").

The Armstrongs' argument that these issues were only raised "tangentially" at trial (*see* Appellee's Brief, p. 14), is therefore without merit. Pickett's first and second issues were raised in a timely fashion, and were brought to the trial court's attention. Because Pickett met the *Hart* standard with respect to both issues, his appeal of such issues was properly taken.

III. THE THRESHOLD LIMITATIONS OF UTAH CODE ANN. § 31A-22-309(1) ARE JURISDICTIONAL, AND APPLY EVEN THOUGH PICKETT'S ANSWER WAS STRICKEN

The Armstrongs argue that the threshold limitations of the PIP statute, Utah Code Ann. § 31A-22-309(1)(a)(I) -- (v), are merely affirmative defenses. The specific threshold requirements at issue, however, are prefaced by the following language:

> (a) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection **may not maintain a cause of action for general damages** arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following: . . .
>
> (i) death;
>
> (ii) dismemberment;
>
> (iii) permanent disability or permanent impairment based upon objective findings;
>
> (iv) permanent disfigurement; or
>
> (v) medical expenses to a person in excess of $3,000.

Utah Code Ann. § 31A-22-309(1) (emphasis added). That statutory prohibition against the pursuit of general damages in some circumstances should be strictly enforced.

The prohibition against maintaining a cause of action in the absence of meeting one of the damages thresholds is essentially jurisdictional. A claim for which the court lacks jurisdiction should be dismissed and should not be entertained. Utah R. Civ. P. 12(h) states that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." This Court has repeatedly recognized that the Utah PIP Statute provides a complete bar to the pursuit of some claims. In *Allstate v. Ivie,* 606 P.2d 1197 (Utah 1980) this Court stated that the "injured party is **precluded** from maintaining an action to recover general damages. . . **except** where the threshold requirement of Section 9(1) are met . . .

> if a party has the security required under Section 5, the no-fault insurance act confers two privileges: first, he is granted partial tort immunity; second, he is not personally6 liable for the benefits provided under Section 6. He does, however, remain liable for customary tort claims, viz., general damages and economic losses not compensated by the benefits paid under Section 6, where the threshold provisions of Section 9(1) are met.

Id. at 1200. (Emphasis added)

That case also states that "under Section 9(1) and (2), the tort-feasor [in this case Pickett] has partial immunity for general damages UNTIL the threshold provisions are met . . . ." *Id.* at 1201. (Emphasis added) This court did not hold that the immunity exists only if pleaded, or that the partial tort immunity granted by Utah's no-fault law had to be pleaded before it became effective. This Court's statement that individuals are precluded from pursuing claims for general damages until the threshold requirements are met should be

enforced in every case, not just where it may be pleaded. The Court must give due regard to its statement in *Allstate* that "under the Utah No-Fault Insurance Act, the tort-feasor who has the required security, is not personally liable to the injured person for payment of Section 6 benefits." *Id.* at 1202-03.

When the PIP threshold limitations issue was raised at the Damages Hearing, it was argued that the trial court did not have jurisdiction to enter a judgment for general damages unless each plaintiff could show he had met at least one of the enumerated thresholds. The trial court therefore erred by entering a judgment for general damages after the Armstrongs failed to produce evidence demonstrating they had met the threshold requirements of Utah's PIP Statutes.

The threshold requirements of Utah's PIP Statues, unlike the statutes relied upon in the Armstrongs' Brief, deal with the magnitude of damages. Allegations regarding the ***amount of damage*** claimed by a plaintiff are never deemed admitted based on a defendant's failure to deny the amount in his answer. *See* Utah R. Civ. P. 8(d); *Taylor v. United States*, 821 F.2d 1428 (9th Cir. 1987) (holding that a statutory damage cap is not an affirmative defense under Fed. R. Civ. P. 8). Plaintiffs must, therefore, demonstrate they have met the threshold requirements before they can pursue a claim for general damages. Because the amount of damage, or severity of the injury, is the central theme of Utah's PIP threshold limitations, it is not an affirmative defense that needs to be raised in a defendant's answer.

In *Taylor*, the court considered whether California Civil Code § 3333.2, as incorporated by the Federal Tort Claims Act, was an affirmative defense that was waived by the government when it failed to raise the statute in its answer. The California statute limited the amount of general damages a plaintiff could recover against a health care provider to $250,000 in actions sounding in professional negligence. In *Taylor*, the plaintiff argued that a government-owned hospital, which did not contest liability in a medical tort claim case, had waived the protection of § 3333.2 by failing to raise it in its answer. *See Taylor*, 821 F. 2d at 1432.

Rejecting this argument, the *Taylor* court distinguished between affirmative defenses and statutes that limit damages, stating "[i]f the Federal Rules do not require plaintiffs to plead the extent of damages sought, defendants should not be required to plead the limitation of damages prescribed by § 3333.2." *Id.* at 1433. The court went on to note that Fed. R. Civ. P. 8(d) [which is similar to Utah R. Civ. P. 8(d)] "specifies that averments as to the amount of damage which a defendant does not deny in his answer are not deemed admitted." *Id.*

The PIP thresholds involved in this case relate to the amount of the Armstrongs' damages (namely, the seriousness of the injuries and/or the amount of the medical bills), and serve to limit a plaintiff's damages regardless of the status of Pickett's Answer. Using the analysis of *Taylor*, Utah's PIP threshold requirements would only be affirmative defenses if the Armstrongs were required by the Rules of Civil Procedure to allege the amount of their damages and such averments had to be affirmatively denied. Because

Pickett was not ever required, under Utah R. Civ. P. 8(d), to challenge the alleged severity of the Armstrongs' injuries in his answer, he should not similarly be required to invoke the PIP thresholds of Utah Code Ann. § 31A-22-309(1) as an affirmative defense in order to be protected by them. The trial court's decision in this case should have been limited by the requirements of Utah's PIP Statute.

Even if this Court decides that the PIP thresholds are an affirmative defense, public policy considerations should excuse Atlanta Casualty, Pickett's insurer, from being bound by the striking of Pickett's pleadings for his failure to cooperate in defense of his case. Affirmative defenses must be timely pleaded to avoid the potential for prejudice and unfair surprise to the plaintiff. *See Sanderson-Cruz v. United States*, 88 F. Supp. 2d 388, 391 (E. D. Penn. 2000) (holding that Pennsylvania's PIP threshold statute was an affirmative defense that the government was required to raise in answer to auto accident claim). As the *Sanderson* court noted, "the fact that a defendant can only learn whether the limited tort defense is available after doing some initial discovery weighs against treating the limited tort defense as an affirmative defense." *See Sanderson-Cruz*, 88 F. Supp. 2d at 391, n.3.

In this case, the Armstrongs' counsel was well aware that, although Pickett had been defaulted for his failure to participate in discovery, Pickett's insurer, Atlanta Casualty, was still involved in the case for the purpose of contesting the amount of damages. Allowing the threshold limitations to be raised as a defense at the Damages Hearing did not result in any prejudice or unfair surprise. The existence of the PIP threshold limitations simply requires evidence that they have been met before general damages can be awarded. The

failure to produce such evidence does nothing more than deprive Plaintiffs of damages they are not entitled to receive anyway.

As the transcript of the Damages Hearing reflects, counsel for the Armstrongs was prepared to meet the challenge of the PIP thresholds presented by Pickett's arguments, and in fact persuaded the trial judge that the thresholds did not apply. The Armstrongs therefore suffered no prejudice by the invocation of the PIP thresholds at the Damages Hearing.

Utah Code Ann. § 31A-22-303(6) precludes an insurer from avoiding liability to a third party (up to its policy limits) for its insured's lack of cooperation, unless it can demonstrate there is collusion between the insured and the claimant. Furthermore, subpart 5 of that Section imposes a duty upon insurers to defend their insureds in good faith "against any claim or suit seeking damages which would be payable under the policy." *Id.* While insurers are statutorily obligated to defend their insureds against all claims, and pay up to their policy limits, irrespective of their insured's willingness to assist them, they should not be saddled with the additional burden of being deprived of the threshold requirements of the PIP Statutes when their insureds refuse or fail to cooperate in a case.

Utah Code Ann. § 31A-1-102 states that Utah's Insurance Code (Title § 31A Chapters 1 through 35) was passed to "ensure that policyholders, claimants, and insurers are treated fairly and equitably," Utah Code Ann. § 31A-1-102(2), and Utah's insurance laws must be "liberally construed" to achieve that purpose, Utah Code Ann. § 31A-1-201(1). It would be patently unfair to allow one insurer or insured to be protected from

claims for general damages in some cases while another insurer or insured is exposed to such damages, even when it did nothing wrong.

In this case, Pickett's counsel made every reasonable effort to secure Pickett's cooperation in defending this suit, and to avoid a default judgment. Taking the protections provided by the PIP thresholds away from Atlanta Casualty would not only punish Atlanta Casualty for something over which it had no control (i.e. Pickett's failure to cooperate), but it would also undermine the goals championed by the Utah Legislature in enacting the insurance statutes. The no-fault statutes in particular were enacted to stem the rising costs of automobile accident insurance and provide for the efficient resolution of claims involving small damages. Neither goal would be advanced by eliminating the threshold protection which the legislature has created. Both goals, in fact, would be harmed by making the no-fault threshold requirements an affirmative defense.

For the foregoing reasons, the trial court's ruling that the threshold limitations of Utah Code Ann. § 31A-22-309(1) provide an affirmative defense that was waived by the striking of Pickett's pleadings should be reversed. As a consequence, the awards for general damages to Daniel, Jared and Taylor Armstrong should be reversed as well because they failed to meet the threshold requirements when they fail to produce admissible evidence of permanent impairment, permanent disfigurement, or medical expenses in excess of $3000 as required by the statute.

IV. PICKETT STIPULATED TO THE ADMISSION OF PLAINTIFFS' EXHIBITS AS TO FORM AND FOUNDATION, BUT RESERVED OBJECTIONS ON ANY OTHER GROUNDS

The Armstrongs claim that Pickett stipulated wholesale to the admission of all of the Armstrongs' Exhibits, contained in a black binder marked "Plaintiffs' Exhibit 1." That misconstrues the agreement. The true nature of the stipulation regarding the admission of the exhibits was discussed at the Damages Hearing of October 16, 2000, where counsel for Pickett stated "we've stipulated to everything. At least, we're not going to object to the form and foundation of anything . . . ." R. 578 at pg. 21.

Counsel for the Armstrongs raised no objection to this statement, which clearly reserved Pickett's right to object to any portion of the exhibits on any other ground. In essence, Pickett's counsel extended a time, effort and expense-saving favor to the Armstrongs and the trial court by agreeing not to require the authentication of every document the Armstrongs wished to introduce. The Armstrongs now wish to turn that courtesy into a reason to recover inflated and non-recoverable damages by arguing that the trial court could rely on any evidence contained in "Plaintiffs' Exhibit 1," whether or not such evidence was admissible, relevant or actually introduced at trial or through the briefing process.

All objections raised by Pickett during the Damages Hearing, and in Pickett's Damages Briefs that do not relate to form or foundation of the exhibits should have been considered by the trial court. The trial court's consideration of any inadmissible evidence

that was objected to by Pickett, or which was not properly introduced at trial, is therefore properly appealable.

V. PICKETT ADEQUATELY MARSHALED THE EVIDENCE THAT SUPPORTED THE TRIAL COURT'S FINDINGS

The Armstrongs misconstrue the nature of Pickett's burden to the marshal the evidence on appeal. That burden has been clearly articulated. This Court has instructed that "[t]o successfully challenge a trial court's findings of fact on appeal, '[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be "against the clear weight of the evidence," thus making them 'clearly erroneous.'" *See Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998) (citations omitted).

Pickett does not have to marshal evidence in support of findings that are **not** challenged on appeal. Nevertheless, in support of the claim that Pickett failed to marshal the evidence, the Armstrongs photocopied the entire trial exhibit book (well over seven hundred pages of material) and declared that it is fatter than Pickett's Addenda, Volume 2 (containing all the evidence marshaled by Pickett). From this, the Armstrongs conclude that Pickett has failed to marshal all the evidence that supported the trial court's determinations.

The Armstrongs, however, have failed to identify, with particularity, a single scrap of unmarshaled evidence which provides support for any of the trial court's findings challenged by Pickett. In order to demonstrate that Pickett failed to marshal all the evidence the Armstrongs must perform two simple steps. First, identify a challenged

finding; and second, present, at a minimum, some additional evidence that Pickett failed to produce that supports that particular finding. Instead, the Armstrongs ask the Court to wade through over seven hundred pages of evidence that may or may not be relevant to any of the findings that Pickett has challenged, and then compare that to the evidence marshaled by Pickett. In doing so, the Armstrongs have failed to provide the Court with any meaningful assistance in understanding their allegation that the evidence has not been marshaled, nor have they provided Pickett with a reasonable opportunity to demonstrate that the allegedly missing evidence **WAS** appropriately marshaled.

The Armstrongs have not demonstrated that the evidence marshaled by Pickett is incomplete. Instead, they seek to have this Court carry that burden, by sifting through the record and, on its own, identify what Pickett has omitted. Because the Armstrongs' assertion that Pickett failed to marshal all the evidence is not properly supported it should not be considered by this Court.

VI. THE ARMSTRONGS FAILED TO MEET THE NO-FAULT THRESHOLDS

Because Jared and Daniel Armstrong did not meet the threshold limitations of Utah Code Ann. § 31A-22-309(1) by showing permanent impairment or permanent disfigurement, it was improper for the trial court to award them general damages.

A. Jared Armstrong's Scars Did Not Meet the Statutory Threshold

Point VI(A)(1) of the Armstrongs' argument, regarding whether Jared Armstrong's scars are "permanently disfiguring" as required by Utah Code Ann. § 31A-22-309(1), does not respond in any meaningful way to Pickett's Brief. The Armstrongs cite one dictionary

dictionary definition and assert, without support, that "Jared and his mother both described the scars as disfiguring."

When asked, in his deposition, how the scars affected him, Jared testified "I just look in the mirror and I see them, and I wish they weren't there." *See* Pickett's Addendum, Tab B-3, pg. 8. The medical records of Dr. Jed Bindrup refer to Jared's complaint, in 1995, that the scars looked like "big zits." Plaintiff's Exhibit 1 at 140. [3] Nowhere in the record did Jared, or his mother, specifically describe the scars as "disfiguring."

Moreover, Jared's and his mother's opinion of the scars are not determinative; rather, the plain language of the statute is controlling. A determination of whether the scars are "permanently disfiguring" is simply a matter of applying the statute to the facts. The best illustration of those facts, and the only ones before the trial court since Jared did not testify, can be found in two photographs found in the record at Plaintiff's Exhibit 1, pg. 148 and a third photograph at Exhibit 1 to Jared Armstrong's Telephone Deposition, beginning at Plaintiff's Exhibit 1, Tab U. The first two photographs show barely perceptible scars along Jared's left jaw line. For this picture, Jared was required to tilt his head and the camera angle is from below to emphasize the markings. Similarly, the third and more

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[3]While Pickett's initial Brief does refer to pp. 137-140 of Plaintiff's Exhibit 1 as portions of the record that support the trial court's judgment, (*see* Pickett's Brief at pg. 19, ¶ 17(a)) these pages were inadvertently left out of Pickett's Addenda, Vol. 2. Pages 137-140 of Plaintiff's Exhibit 1 contain medical records regarding Jared's scars. The photographic exhibit to the Telephone Deposition of Jared Armstrong, found at Plaintiff's Exhibit 1, Tab U, was also referred to in Pickett's initial Brief but was also inadvertently omitted from the Addenda (*see* Pickett's Brief at pg. 19, ¶ 15 and pg. 39). In order to facilitate this Court's review of the evidence we have included the missing pages with this Reply Brief as Addendum C.

recent photograph shows the skin stretched above the jaw line, which emphasizes and broadens scars that would ordinarily not be visible. Neither of these photographs was taken with Jared in a natural posture or from a natural viewer's perspective.

These minor injuries are not the type of injuries the legislature envisioned when it used the language "permanent disfigurement." This appears especially so, given the context of the statute, which speaks of dismemberment and death in the same section. The trial court therefore erred as a matter of law when it awarded Jared general damages for this injury.

B. Pickett's Counsel Did Not "Acknowledge" That Jared's Scarring Met the Threshold of Permanent Disfigurement

In light of the general argument presented by Pickett's counsel that the threshold limitations of Utah Code Ann. § 31A-22-109(1) were a bar to the Armstrongs' claims for general damages and the trial court's prior ruling on that issue, it cannot be properly said that Pickett's counsel "acknowledged" Jared had met the threshold. (R. 578, pp. 5-19.) The broader issue of whether the thresholds described in subsections (i)-(v) of the statue apply to this case encompasses the specific issue of whether Jared's scarring constituted a "permanent disfigurement" under § 31A-22-309(1)(d). Because the trial judge ruled, generally, that the threshold limitations were an affirmative defense that had been waived by Pickett's default, Pickett's counsel was not required to raise, as a separate issue, each particular threshold described by the statute. It was sufficient, for purposes of this appeal, that the general issue was raised and resolved by the trial court.

C. Daniel Armstrong's Back Injury Did Not Meet Any of the Threshold Requirements of Utah Code Ann. § 31A-22-309(1)

Daniel Armstrong could have met the threshold requirements of Utah Code Ann. § 31A-22-309(1) in either of two ways. First, he could have shown that, under subsection (v), he had medical expenses in excess of $3,000 as a result of the accident. Second, he could have shown that, under subsection (iii), he incurred "permanent disability or permanent impairment based upon objective findings." Daniel Armstrong, however, did neither.

The Armstrongs' Brief sustained medical expenses arising from the accident of at least $3,823.00. *See* Armstrong Brief at 23. According to the trial court's Findings, however, which were drafted by the Armstrong's own counsel, "Daniel sustained a total of $2,884.97 in special damages relating to medical treatment of injuries resulting from the collision."[4] R. 552 (Pickett's Addenda, Vol. 1, Tab J). Because the Armstrongs have not cross-appealed and challenged this finding, this figure has crystallized and cannot now be challenged. Daniel Armstrong therefore failed to meet the threshold of § 31A-22-309(1)(e), requiring medical expenses in excess of $3,000.

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[4]It is also insightful to note that the $2,884.97 figure arrived at by the trial court included $1,073.00 for a leather executive chair with lumbar support that Daniel Armstrong claimed to have purchased based upon the inadmissible hearsay testimony of a chiropractor who did not even treat him or see him for any injury related to or arising from this accident, [R. at 286, 526, 548] and $1,071.22 for a CT-Scan from LDS Hospital performed over 22 months after the accident for "back pains down the right leg, moderate for one year," (10 months after this accident) without any evidence to support a finding that the CT-Scan was necessary or reasonable because of the accident [R. 286 and p. 103 of Plaintiffs' Exhibit D.]

Also in their Brief, the Armstrongs claim that "while Dan Armstrong did not have a physician testify that he suffered a specific percentage impairment . . . there was nonetheless *objective testimony* of his permanent impairment." *See* Armstrong Brief at 23 (emphasis added). However, "permanent impairment based upon objective findings" is statutory language. "Objective findings," of impairment, for purposes of the statute, has been interpreted by the Utah Court of Appeals to mean the professional opinion of a physician. *See McNair v. Farris*, 944 P.2d 392, 395-96 (Utah Ct. App. 1997) (affirming summary judgment for defendant in an auto accident case where plaintiff had failed to secure the opinion of a doctor that he was permanently disabled or impaired as required by § 31A-22-309(1)(c)).

Nowhere in the record is there any testimony, affidavit, or even a deposition of a physician, or anyone else for that matter, offering an opinion as to the permanency of Daniel Armstrong's back condition, let alone any evidence of objective findings of a permanent impairment. The record does not contain any medical charts or records that show Daniel has experienced back pain because of this accident. By his own admission, however, it is clear that Daniel had a history of back trouble before his accident with Pickett. How much of Daniel's back pain is attributable to the January 1996 accident involving Pickett and how much of it is attributable to other causes is thus a complex medical question. No expert opinion was offered to show that Daniel's condition was in fact worse after the January 1996 accident, or that any worsening of Daniel's condition was

attributable to that accident. It was, therefore, error for the trial court to award Daniel any general damages for this injury.

VII. THE INDIVIDUAL JUDGMENTS WERE EXCESSIVE AND NOT SUPPORTED BY THE EVIDENCE

The awards to each of the Armstrongs were all excessive and should be revisited because they were not supported by the admissible evidence before the trial court. Moreover, the property damage award to Daniel Armstrong for the loss of Lorene Armstrong's personal property was improper because he did not have any ownership interest in that property.

A. Taylor Armstrong's Personal Injury Judgment

The Armstrongs' Brief also failed to respond in any meaningful way to Pickett's arguments regarding the insufficiency of the evidence to support the judgment amounts. There was no expert opinion that, to a reasonable medical probability, Taylor's concussion would limit his success in college or even impact him in any meaningful ways. The portion of the judgment awarding Taylor Armstrong general damages of $350,000, was, therefore, impermissibly based upon speculation and conjecture. The Armstrongs respond with the mere assertion that Taylor's injury ("a mild concussion") is *the type* of injury that could have monumental consequences. [Armstrong Brief at p. 24]

The Armstrongs do not even challenge the fact that Dr. Bigler's deposition testimony discussed only the kinds of problems that children with similar injuries, as a group, can experience in the future. When questioned about Taylor specifically, however, Dr. Bigler would not or could not testify about the likely effects of Taylor's injury on him.

See Pickett's Brief at 42-43. In light of Dr. Bigler's unwillingness to provide expert opinion about the extent of Taylor's injuries or his future limitations, the trial court's finding of a limitation and the consequent award of general damages was clearly erroneous, and the general damage award of $350,000 for Taylor should be overturned.

B. Jared Armstrong's Personal Injury Judgment

With regard to Jared's scars, the photographs in the record clearly show that both before and after his surgery, they are scarcely visible unless his skin is pulled up over the jaw line or the scars are viewed from obscure angles. *See* Plaintiff's Exhibit 1, pg. 148 and Exhibit 1 of Jared Armstrong's Telephone Deposition, at Plaintiff's Exhibit 1, Tab U. Moreover, Jared's only testimony regarding the impact of those scars upon his life was that he "wish[es] they weren't there." *See* Pickett's Addendum, Tab B-3, pg. 8. The $10,000 judgment for general damages for that minimal scarring was not supported by substantial evidence, is clearly erroneous and should be overturned.

C. Daniel Armstrong's Personal Injury Judgment

With regard to Daniel Armstrong's back injury, there was no substantial evidence connecting the January 1996 accident to Daniel's current complaints. As stated in Point VI(C) above, there was no expert medical testimony of permanent impairment to support Daniel's subjective testimony, and there was absolutely no admissible evidence that the January 1996 accident was responsible for any aggravation of his pre-existing back pain. The $10,000 award to him, was therefore, clearly erroneous and should also be set aside.

D. Daniel Armstrong's Property Judgment for His Wife's Automobile

Finally, the award to Daniel Armstrong for damages to his wife's car should be overturned because he did not have an ownership interest in it [Plaintiff's Exhibit 1, p. 4] and because he did not pray for any property damages in his Complaint. Daniel had no right to transfer or encumber the vehicle because he did not have title to it. Because he had no property right in the vehicle, it follows that he was not entitled to sue for damages to it.

The Armstrongs cite *Marsh v. Marsh*, 973 P.2d 988 (Utah Ct. App. 1999) for the proposition that Lorene Armstrong's Suburban was marital property. Based upon this notion, they argue that Daniel had a sufficient interest in the automobile, and thus standing to sue for its loss. However, the Armstrongs provide no support for the notion that the concept of "marital property" is applicable to this case.

This is a tort case -- an action at law -- and not a proceeding in equity. The concept of "marital property" should not, therefore, even apply. *Marsh* defines the concept of marital property only in the context of a divorce action. The Armstrongs have failed to cite any authority which holds that the concept of "marital property" entitles a party to sue in the name of his or her spouse for damages to that spouse's separately titled property. Under a marital property system like Utah's, "as long as the marriage lasts, each spouse owns and manages assets that he or she brings into or acquires during the marriage." Leslie J. Harris et al, Family Law 330 (1996). Such assets become shared assets only when the marriage ends. *See Id.* Because Lorene and Daniel Armstrong were married at the time her

Suburban was damaged, and the title was in her name, the Suburban was her property and she was the only party entitled to sue for its loss.

Even if we assume, for purposes of argument, that the concept of marital property could entitle Daniel to sue for damages to his wife's automobile, no evidence was presented below to show that the automobile was in fact marital property. In making an equitable distribution of property in divorce, courts generally award property acquired by one spouse by gift and inheritance during the marriage to the receiving spouse. *See Mortensen v. Mortensen*, 760 P.2d 304, 309 (Utah 1988).

No evidence was presented below to show how Lorene Armstrong acquired title to her Suburban. If relatives had gifted it to her, or if she had purchased it through non-marital assets, the vehicle would not be marital property, and Daniel could not have any interest in it. Because the trial court made no findings regarding whether the Suburban was marital or non-marital property, it could not properly assume that it was marital property and award Daniel Armstrong a judgment for the loss.

Moreover, Lorene Armstrong was not a claimant in this lawsuit as the Armstrongs claim. Her name was on the pleadings only in a representative capacity, as guardian ad litem for her son, Taylor. Thus, she was only entitled to represent his interests, not her own.

Finally, the Armstrongs' Complaint did not even pray for damages to the automobile. *See* R. at 1-3. The Complaint was never amended, and Pickett's counsel objected in a timely manner to the introduction of any evidence regarding damages to the vehicle at the

Damages Hearing, which was the first occasion where the Armstrongs raised the issue. *See* R. 578, pg. 41. Pickett's due process rights were violated when the trial court considered this evidence because he had no notice that such a claim would even be made at any time before the hearing. The award for the loss of the vehicle was therefore improper, and should be reversed.

VIII. BECAUSE THE ARMSTRONGS HAVE NOT CROSS APPEALED, THEY ARE NOT ENTITLED TO RAISE THE ISSUE OF WHETHER PICKETT'S COUNSEL HAD AUTHORITY TO APPEAR

It is well established law that an appellee seeking to raise an issue before the Supreme Court on appeal must cross appeal, or the issue will not be considered. *See American Coal Co. v. Sandstrom*, 689 P.2d 1, 688 (Utah 1984); *Cerritos Trucking Co. v. Utah Venture No. 1, Utah*, 645 P.2d 608, 613 (Utah 1982).

Nevertheless, the Armstrongs wish to raise the issue of whether Pickett's counsel had authority to appear in the trial court on Pickett's behalf. Moreover, the Armstrongs attempt to raise this issue without a proper citation to the record showing that the issue was preserved. They claim that they filed a motion under Utah Code Ann. § 78-51-33, requesting that Pickett's counsel give proof of his authority to appear. The alleged motion, however, does not appear in the record where the Armstrong's claim it appears [R. 578, p. 1], and, with the exception of the Motion to dismiss the Appeal on those grounds filed with this Court, Pickett cannot find such a motion elsewhere in the record.

Additionally, counsel for the Armstrongs conceded, at the October 16, 2000 Damages Hearing, that Pickett's attorney could defend the case as far as the extent of

damages was concerned. (*See* R. 578, at pg. 9, where counsel for the Armstrongs stated, "if he has some argument that the medical expenses are too high, or if he has some argument that Taylor Armstrong, you know, doesn't suffer a brain injury, then certainly he's entitled to put that on.") The Armstrongs are thus not entitled to raise the issue now, and this Court should decline to consider it.

CONCLUSION

Pickett adequately preserved the legal issues of: (1) whether Daniel Armstrong was entitled to a judgment for property damage to property he did not own; and (2) whether Pickett and/or his insurer were entitled to any of the protections afforded by Utah's no-fault statutes for this appeal. Because he did not have to take any steps to preserve his right to challenge the factual findings of the trial court in a case tried before the bench, the appealed factual determinations are also properly before this Court. Additionally, Pickett appropriately marshaled all of the evidence which supported the challenged factual determinations. The Armstrongs failed to point to any specific supportive evidence in the records that was not marshaled by Pickett. Therefore, the factual determinations and sufficiency of the evidence are also appropriately before this Court.

Pickett's stipulation as to the form and foundation of the Armstrong's proposed exhibits did not equate to a stipulation as to the admissibility or weight of any of the evidence.

Public policy, fairness to insureds and insurance companies, well-established case law, the plain language of the statute and the purpose of Utah's no-fault law, all indicate that

the threshold requirements of Utah Code Anno. §31A-22-309(1) prevent a cause of action from arising until or unless those threshold requirements are met. Therefore, even in light of Pickett's default, it was inappropriate for the trial court to award the Armstrongs any amount for general damages when there was not sufficient admissible evidence to establish that they met those threshold requirements.

Even if the threshold requirements do not bar the Armstrong's claims for general damages in this case, the damages awarded by the trial court were clearly excessive in light of the admissible evidence presented at the hearing and in the parties' Damages Briefs.

For the forgoing reasons, and the reasons set forth in Pickett's Initial Brief, the Judgment of the Trial Court should be set aside and this case remanded for an appropriate determination of damages based upon the evidence before this Court.

RESPECTFULLY SUBMITTED this 14th day of January, 2002.

SCALLEY & READING, P.C.
Attorneys for Appellant/Glen C. Pickett

Steven B. Smith

CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of January, 2002, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT was served upon counsel of record by depositing the same in the United States mail, postage prepaid and addressed as follows:

Robert H. Wilde, No. 3466
Wilde & Associates
935 East South Union Avenue, Suite D102
Midvale, Utah 84047

Dana L. Kay

Tab A

the vehicle that was being driven?

A A '92 Chevrolet Suburban.

Q All right, would you turn to Tab J of Exhibit 1, Exhibit, or Page 274, page stamped 274.

MR. SMITH: We'd object to any information being submitted about the value of the vehicle. The fact that Lorene Armstrong was the owner of the vehicle at the time and the loss of the vehicle was compensated by both insurance companies, and there's no actual property damage lost.

Q (BY MR. WILDE) Mr. Armstrong, what have you been compensated for the vehicle?

A I believe that they sent me a payoff which what we owed First Utah Bank at the time, and I think they gave me one other small check afterwards.

Q All right, and so how much was paid to you?

A I believe, and I'm just calculating, maybe about $18,000.

Q $18,000? What was the value of the vehicle at the time?

MR. SMITH: I object to the question, lacks foundation.

THE COURT: Well, I thought that, these are already stipulated to.

MR. WILDE: They have.

THE COURT: That's in here.

A Periodically.

Q Okay, can you flip over to Page 545? Down to number four, medical history, is that a part you filled out?

A Yes.

Q And is that your writing where it says some blood in urine, result severe sore throat when child?

A Yes.

Q Okay, what about up on the next side where it says sleep rest pattern, is that your writing as well?

A Yes.

Q And that says do you have any problems sleeping and you marked the box yes?

A Yes.

Q And then you wrote back pain after three to four hours of laying?

A Yes.

Q Can you go back to Tab A? Very first page. The owner of the vehicle damaged in this accident was Lorene Armstrong, correct?

A Yes.

Q Okay. She was the registered owner?

A Yes.

Q She was the titled owner?

A Yes.

Q Flip over to Tab J if you could. Down on the bottom

paragraph, third line up from the bottom, the evaluation, it says the new evaluation on the car is $27,357.49.

A That's correct.

Q And the USF&G was going to pay you $27,157.49?

A That's correct.

Q Okay, did they do that?

A I believe so. I'm not certain.

Q Okay. And the $18,000 came from Atlanta Casualty?

A I believe so.

Q Okay, and if you flip to the Page 270 - 278, it's a document prepared by [inaudible] Solution Group. Was that evaluation given to you by USF&G?

A I'm uncertain as who gave me this.

Q Okay, there it has equipment package adjustment, $3,270. Was it your understanding that that reflected the stereo and the other equipment that was in the car?

A No, I believe that included the 4-wheel drive, the power door locks and other things.

Q Okay, and in fact you were able to take everything out of that car that you wanted?

A Yes. Some did not appear to be very good after we took it out.

Q If you could flip back to Exhibit R. These are Taylor's school records. Have you seen those before?

A Yes.

560.70, all of which have already been paid by Glen Pickett's insurer. Mr. Armstrong, therefore, hould not recover any amount for general damages pursuant to Utah Code Ann. § 31A-22-309.

PROPERTY DAMAGE CLAIM

Daniel Armstrong does not have standing to pursue a claim for property in which he does not ıve an ownership interest. Lorene Armstrong was the registered and titled owner of the vehicle ımaged in this accident. She, and only she, could bring a claim for property damage to that vehicle. 'ranscript at p. 48, lines 17-24, attached hereto as Exhibit A, and the Accident Report, p. 01 of ‹hibit A on file with this Court].

Nevertheless, even if Mr. Armstrong is entitled to pursue his wife's claim for property mage, he already received full and complete reimbursement from the insurance companies volved in this accident for that property damage. Allowing Mr. Armstrong to recover any ditional funds would result in a double recovery for the property damage sustained. Mr. mstrong also claims he is entitled to recover for items not included in the insurance companies' imates of the value of the damaged vehicle such as stereo equipment, speakers, and a television He, however, retrieved all of those items from his vehicle and testified that they didn't look too ɔd, but could be reutilized. [Transcript at p. 49, lines 19-22, attached hereto as Exhibit A]. He ıuld not, therefore, recover any amount for those claimed damages. Mr. Armstrong failed to show t the accident in this case destroyed the extra equipment for which he now seeks reimbursement. thermore, because there is no logical explanation why he could not re-use the property, or ience produced regarding its current condition, Mr. Armstrong should not be allowed to recover amount on his property damage claim.

Armstrong worked out before and after the accident and the only claimed difference was the frequency of his work-outs. Because there is no evidence of medical necessity or reasonableness for the chair or the spa, and because those claimed expenses would have been incurred whether this accident had happened or not, they should not be awarded to Mr. Armstrong as a windfall at Mr. Pickett's expense.

General Damages Because Mr. Armstrong's pain and suffering was minimal and short-lived, he should be awarded a minimal amount for general damages not to exceed $500.

Daniel Armstrong's Property Damage Claim

Daniel Armstrong does not have standing to pursue a claim for property in which he does not have an ownership interest. Lorene Armstrong was the registered and titled owner of the vehicle damaged in this accident. She, and only she, could bring a claim for property damage to that vehicle. [Transcript at p. 48, lines 17-24, and the Accident Report, p. 01 of Exhibit A on file with this Court]. Nevertheless, even if Mr. Armstrong is entitled to pursue his wife's claim for property damage, he already received full and complete reimbursement from the insurance companies involved in this accident for that property damage. That claim has been fully and finally resolved between the insurers and allowing Mr. Armstrong to recover any additional funds would result in a double recovery for the property damage sustained. Finally, because Mr. Armstrong retained the salvage, including all the electronic equipment and received the full estimated value of the vehicle, he should not recover any amount for claimed "add ons." Furthermore, there is no evidentiary support for the claimed figure of $5,147.78 for "add-ons" which were not paid for by the insurance companies in Exhibit J (pp. 274-96) of the Exhibit book on file with this Court. The only amount which is supported by evidence is $254.70 for a Ming Mirror Finish on p. 288 of Exhibit J

Jared' Armstrong's Claim for Scarring

Special Damages Defendant does not dispute any of Jared's claimed special damages. Nevertheless, because they were already paid for by his own insurer, no amount should be awarded to

Tab B

are no defenses, no affirmative defenses, and so accordingly, the no-fault statute it's not a defense. A causation is not a defense. We're only looking at the amounts of damages, and I have two expert witnesses here, I have a police officer and a toxicologist to establish the level that Mr. Pickett's inebriation at the time purely as that goes to allowing the Court to enter an award of punitive damages, and I think that the Court needs to have evidence on his prior alcohol related conviction and his inebriation in order to appropriately assess the level of punitive damage.

But other than that, I think the Court is exactly right. That we're looking solely at the amount of damages and since this is an automobile accident and particularly as it relates to Taylor we're looking at, we're going to ask the Court for a substantial amount of general damages. There needs to be some sort of evidence that's going to allow the Court to understand what's an appropriate amount of general damages and we have the deposition which we're going to read excerpts of Dr. Bigler to address the amount of general damages. But I believe that's exactly right. All we're doing is looking at the amount of damages and all those other issues have been resolved by Mr. Pickett's default.

MR. SMITH: Well, we disagree, Your Honor. In case of Allstate v. Ivy, Bear River v. Wall, both in the Court of Appeals and the Utah Supreme Court, it's explicitly stated that

a plaintiff who has received recompense through personal injury protection benefits should not even pray for the damages for which they received from the insurance company that's protecting them at the time. They have a, that there's a, and that the statute 31A.2-309, Subsection 6 provides immunity to those individuals who sec - who provide the security necessary required by the statute and that in this case Glen Pickett provided the security required by the statute and therefore is in, he is entitled to immunity from the claims for damages represented by what was paid in PIP benefits. The PIP benefits are paid by the under, by the, by the injured parties insurance carrier and that injured parties insurance carrier has a statutory right of subrogation in arbitration, mandatory arbitration against Glen Pickett's insurance company. Those things have taken place. That it would be inequitable, it would represent a double recovery, and it would be contrary to statute and Utah law to permit them to plead for those damages, to pray for those damage, to recover those damages when that's been done one time already.

THE COURT: Well, how do you mean it's been done one time already?

MR. SMITH: USF&G, the Armstrong's insurance company has claimed -

THE COURT: Oh.

MR. SMITH: - submitted a claim against Land Casualty

and Land Casualty resolved that claim with USF&G.

THE COURT: But you're just talking the PIP payments.

MR. SMITH: PIP payments, as far as PIP payments go. Correct. Then under Utah law, Glen Pickett, has immunity for any claim for damages for PIP payments, for PIP benefits that were received by the Armstrongs.

THE COURT: Well, are you representing Mr. Pickett or are you representing the insurance company on their subrogation.

MR. SMITH: The party's Glen Pickett. That's who's being sued in this case.

THE COURT: I know the party's Glen Pickett. But answer my question.

MR. SMITH: I'm representing Glen Pickett. His insurance company has retained me to protect his interests.

THE COURT: Well, then you're representing the insurance company in a sub-litigation. Are you taking the position here today that you are here to, to minimize the damages in protection of the insurance company under subrogation?

MR. SMITH: To minimize the damages against both Glen Pickett and the insurance -

THE COURT: Well -

MR. SMITH: - and that the insurance company would have to pay. If the insurance company could, they would have

revoked coverage and they would have said under non-cooperation provision of the policy you have no coverage, you have no right to a defense, no right to indemnification. Under Utah law that's not available, that the insurance company cannot reject coverage from the Armstrongs, because of their insured's non-cooperation unless there's evidence of collusion between the insured and the claimants. This case we don't have any evidence of collusion between Mr. Pickett and the Armstrongs. But we do believe that there's a right that Glen Pickett has to make the arguments before this Court that would reduce whatever damages he would have to pay. The insurance company has an obligation, statutory, contractual obligation to do that in defending him and that's an obligation that they've undertaken by hiring me.

MR. WILDE: But that's not a reduction of damages. That's an affirmative defense. An affirmative defense like all the other aspects of Mr. Pickett's pleadings have been stricken, and so if he has some argument that the medical expenses are too high, or if he has some argument that Taylor Armstrong, you know, doesn't suffer a brain injury, then certainly he's entitled to put that on. But he's not entitled to put on any of the other affirmative defenses he would be entitled to put on. He's not entitled to address comparative negligence or, or the no-fault statute. His affirmative defenses have been stricken, and so all we're here looking for

here today is the amount of the damage.

THE COURT: Well, as I'm looking at this counsel, this has taken me somewhat by surprise. I, of course your pre-trial and I thought you were just going to come and of course put on evidence to damages and that was it, and but it appears it's more than that. I'm the opinion, just as I'm sitting here and listen to what you say that I think Mr. Wilde is right, that I think the affirmative defenses, as far as the liability is concerned, would not be available to the, to the defendant.

I think that the defendant, counsel, is representing the insurance company of their interest under subrogation. That they're the ones that are going to have to pay this and therefore they're entitled to come out and to question and go into anything and any defenses as to damages I think they can raise. I'll, I'll, now when you say comparative, I don't know how you're going to raise the -

MR. SMITH: We had not planned on raising any -

THE COURT: Okay, I was going to say -

MR. SMITH: - in comparative.

THE COURT: - get into that because I was getting ready to question.

MR. SMITH: And I agree with the Court in that regard.

THE COURT: That, that I think that they would be, have the right to question the witnesses and to present any, any defenses of which they could raise as far as the amount of

damages are concerned. Now, if I'm wrong in that I'll, I want to hear from you both right now. That's why I said Mr. Wilde, you're entitled to a jury if they're going to go into that, those matters, and to have them hear it and make that determination.

MR. WILDE: If in fact we're going to go into those matters we'd like a jury. I don't think that's correct, Your Honor. The insurance company is not a party to this action. If they have provided counsel for Mr. Pickett -

THE COURT: Well, let me just talk to you Mr. Wilde, and I'm just ruling off the top of my head, that the insurance company is not a party to this action. Mr. Pickett, Mr. Pickett has a contract with the insurance company to represent him and to protect him. If Mr. Pickett defaults in this matter, I think the, the rights of Mr. Pickett are subrogated to the insurance company for them to come in and to protect their interest as far as this is concerned. Even though they are not a party, they are still the one that's going to be paying at least part of it, maybe all of it, as far as the amounts are concerned, and I think they can raise defenses on the question of damages under the right of subrogation. Now that's my feeling.

MR. WILDE: Well, let me respond to that. Let's say that we filed the lawsuit and said Glen Pickett ran over these people and injured them and itemize the general [inaudible] of

damages and said, Let's have the Court or jury or someone identify what those damages were. And let's suppose that Mr. Pickett instead of going to his insurance company, had an insurance, forgot about the insurance, didn't realize he ought to go to the insurance company, went to someone who's going to be admitted in this session, the new admittees to the bar which are going to be sworn in on the 18th of this month, and this person looked at this and said ah, tort law. I'm gonna go in and raise the tort defenses, but did not bother to consult the insurance company. Did not bother to read the code and find out about the no-fault statute. Did not do any of those sorts of things and just showed up and argued general tort law. It's pretty clear that we're going to be entitled to get whatever damages come out of that and be able to respond to whatever affirmative defenses that person raises.

Now, if in the process, Mr. Pickett did to that attorney what he's done to Mr. Smith, and failed to show up, failed to participate in his deposition and so on, then it's pretty clear that having his answer stricken, having his pleadings stricken, we're going to be able to come in here and just put on the amount of damages.

Now I don't see how that differs in any fashion from where we are now, because an insurance company is not a party, and the fact that Mr. Smith is hired by the insurance company doesn't mean he can come in here and represent the insurance

company's interest with regards to that subrogation. He's entitled to represent Mr. Pickett's interest, and whatever problems the insurance company's have behind the scene, they're certainly entitled to address. But that doesn't mean that those defenses are still viable after the pleadings have been stricken.

THE COURT: Now in your example, counsel, of course the insurance company had no knowledge, they were not brought into it and therefore, it would follow, under my thinking, the insurance company would not be liable for the amount of damages of which were awarded to you because they were never contacted, never brought into this lawsuit of which you proposed.

Here the insurance company is present and they're representing their interests under the subrogation. In other words, you may ask for 50 million and, and I grant you that amount. The insurance company has a right to resist that saying look this is not a $50 million case. This is only a $1 million case and put on the evidence to prove that.

MR. WILDE: Well, but see, that ignores the totality of the insurance circumstances. For example, we've got Mr. Pickett here with the statutory minimum policy. That doesn't alter the fact that Mr. Armstrong has an under insured motorist policy for $300,000, and the, their -

THE COURT: What, what you say there is a no, 300,000?

MR. WILDE: 300,000 under insured policy, so if the

Court awards a judgment against Mr. Pickett -

THE COURT: That's against his insurance company.

MR. WILDE: That's exactly right, and his insurance company is not here today being represented for exactly the same reason that Mr. Pickett's insurance company is not here being represented because all of those claims are taken care of behind the scenes, after the fact, through inter-company arbitration insurance that they just sort out between themselves, what the subrogation rights are and who gets to pay what.

If we read the pleadings from Mr. Pickett, there is no where alleged as a defense the fact that his insurance company has a right to subrogation, because they may well do that, and that's contractual right. But that doesn't fit into this tort case, and the fact that we have Mr. Pickett represented by Mr. Pickett's counsel and those cases he cited are Allstate v. Ivy and they involve insurance companies in the caption of the case, because we had individuals suing the insurance company and insurance companies suing individuals for subrogation and they certainly are big boys and they know how to do that. But that doesn't mean that Mr. Pickett is entitled to have the affirmative defense of the no-fault statute or anything else raised once his pleadings have been stricken.

THE COURT: Well, I'm not saying he has the right under the no-fault statute. Well, that could go to damages I

guess, somewhat. Well let me hear from Mr. Smith, and I've been arguing your position here and I'm not, I'm not sure where we're going.

MR. SMITH: May I approach the bench?

THE COURT: Sure.

MR. SMITH: I'm going to refer to Page 1,200, down under Keynote number 2, and basically what this talks about is when an individual, an injured individual recovers PIP benefits from his insured, he should not even plead for those damages, and I read from that case. It says, -

THE COURT: Well the PIP benefits, they, they're minor though. You're arguing -

MR. SMITH: Correct.

THE COURT: That, that to me is a minor element of this case.

MR. SMITH: Well, it is. However, we believe that if they, that there's still no right to maintain a claim for general damages unless they meet the threshold requirements of the PIP statute. That's a statutory provision that exists and that it would be unjust and unfair to violate their information on statute. It's not ever, it's not listed as an affirmative defense at any point in time. It talks about what an individual's right to recover would be. We think the Armstrongs are, that the damages that would be awarded to the Armstrongs are limited by that statute.

THE COURT: And your speaking of the threshold?

MR. SMITH: The threshold and the PIP benefits. The, the PIP benefits that they received.

THE COURT: And how much is the thresh, how much, we've got two or three defendants here. How many defendants - or plaintiffs, how many plaintiff is the, how many plaintiffs does the threshold apply to?

MR. SMITH: I think, in this case it will only apply to Daniel, the father. That he did not -

THE COURT: Daniel's father?

MR. SMITH: Daniel, the father, the father in this case. That the two boys, that this claim, I guess there's a question on whether or not Taylor has a permanent impairment, permanent injury, but they both received scarring and under the threshold requirements a permanent disfigurement is, I guess, then through the threshold. For Daniel, the father, however, he can not establish that he incurred $3,000 in necessary and reasonable medical expenses as a result of the accident and that would therefore preclude him from pursuing filing. It's the same reason that none of the other Armstrongs that were in the automobile are here in Court today.

THE COURT: So then you are of the opinion they may proceed as far as their other -

MR. SMITH: Correct.

MR. WILDE: What we anticipate is going to happen, is

we're gonna put on our evidence. It's gonna show what the damages are. The Court's going to look at those damages, going to give us a judgment for each of these three people. We disagree with counsel, which is not a surprise, on whether or not there is a permanent injury to, permanent impairment to Daniel Armstrong. However, -

THE COURT: Are you alleging there is?

MR. WILDE: Excuse me? We allege there is, yes. However, -

THE COURT: That's a jury, would be a jury question then.

MR. WILDE: That would be a jury question, but that's not a jury question because the pleadings have been stricken. All right? Now, when we get through and get a judgment awarded to each of these people, then as Allstate versus Ivy says, they're not entitled to have a double recovery for their PIP benefits. Now, the good Mr. Pickett obviously is not here and he's obviously's not going to get out a check and write us a check for whatever it is the Court awards up to the policy limits. That check is going to come from Atlantic Casualty, and Atlantic Casualty is going to be entitled to say, Gee the PIP benefits have already been paid and you're not allowed to claim those PIP benefits and we're going to agree with them and say certainly, that's correct, we're not entitled to those PIP benefits. But that doesn't mean we're not entitled to the

damages beyond the PIP benefits and it doesn't mean they're not entitled, they are entitled to use the no-fault statute as an affirmative defense because that's exactly what it is, and if we read the answer to the Complaint, and I haven't read it for a while, but I will personally guarantee you that one of the affirmative defenses is the no-fault statute and they're, that has been stricken. We're entitled to go ahead, put on evidence with regards to the damages, let the Court determine what the damages are and proceed. If they want to come back on PIP benefits, they're certainly entitled to do that, at that time. But it's not a defense here today.

THE COURT: Well, I agree with Mr. Wilde, Mr. Smith. I think that they can go way beyond PIP benefits and that if a judgment was awarded to them then of course the PIP benefits would just be subtracted for the amount of their award that they claim. I mean from your client.

MR. SMITH: And we don't believe that if, if the threshold requirements are not, are not met that they can proceed on a claim for general damages -

THE COURT: Well -

MR. SMITH: - position and, and to allow them to do so would create an incentive for anyone in an automobile accident to file a lawsuit just in case the person defaulted, whether or not they did or didn't have $3,000 in medical benefits, whether or not they did or didn't reach the

threshold. Once the default is entered then they can recover regardless, and that's the purpose that the statute was enacted to prevent.

THE COURT: You may have a point, Mr. Wilde, it is a question for me to decide. We don't have a jury. As to whether the father has met the threshold, either the, in the amount of dollars or, or permanent injury.

MR. WILDE: I don't think the, I don't think the issue of the threshold is an issue before the Court. That's been stricken. That's an affirmative defense.

THE COURT: Well, I resolve it right now. I'm not sure whether that default - my immediate reaction, Mr. Wilde, is you're correct, but that, that, that, when he defaulted those affirmative defenses he has the right to go out the window but then the insurance company's here on a subrogation, that they have the right under that.

MR. WILDE: And they may have the right to deal with subrogation -

THE COURT: But I would take the position, I'm going to take the position that the affirmative defenses, as far as the statute is concerned, are stricken through his default. Of course, if you take it up on appeal, then maybe you'll find out I'm wrong. Now where does that leave us? Are we ready to go, or do you -

MR. WILDE: We're ready to go.

Tab C

Jared
Armstrong

JUL 2 3 1996

Sutures removed
healing well
instructed on wound care (Sunblock, VITE, etc)
Steri-strips applied
Rtn 2 wks

AUG 1 3 1996

healing well
scars in maturation phase → red & raised
encouraged & reaffirmed to pt the time needed for scar maturation
cont c VITE & massage & Sunscreen
Rtn 2 months

COTTONWOOD HOSPITAL MEDICAL CENTER OPERATION REPORT

SURGEON: JED R. BENDRUP, M.D.

PREOPERATIVE DIAGNOSIS: Four facial scars to the left face.

POSTOPERATIVE DIAGNOSIS: Four facial scars to the left face.

OPERATION: Revision of four facial scars to the left face. Full length 5.3 cm.

Anesthesia: General with Dr. Robinson.

INDICATIONS: The patient is a 15 year old male who was involved in a motor vehicle accident on January 7, 1996. He sustained multiple injuries to his face. These were allowed to heal without initial primary repair. He now has hypertrophic scars along the jaw line and the left cheek. He now presents for revision of these scars.

PROCEDURE: After informed consent was obtained from the patient and his parents he was taken to the operating room where general endotracheal anesthesia was performed by the anesthesia service. The face region was then prepped with Betadine and draped in the usual sterile fashion. The four lesions were then marked and they were infiltrated with .5% Lidocaine with Epinephrine. The lesions were then all excised in their entirety in a lenticular fashion. They were passed for specimen. The skin edges were all then approximated using a 6-0 nylon, carefully lining the edges. All wounds were then closed. The areas were then cleaned, Mastisol applied, followed by steri-strips.

The patient was then awakened in the operating room and was taken to the recovery room in satisfactory condition.

Again total length of repair was 5 3 cm. Sponge and needle counts were correct.

JED R. BENDRUP, M.D.

JRB/TL431 D: 7-18-96 T: 7-20-96
DOC.: FOPARMJ1.JRB Tape: 7021 C: 72005036 77018 3
DIC.: JED R. BENDRUP, M.D. EVD: 7-18-96

IHC LABORATORY SERVICES
IHC A Service of Intermountain Health Care

Elizabeth H. Hammond, M.D.
Chairman, Pathology Dept.

COTTONWOOD HOSPITAL LABORATORY
5770 South 300 East
Murray, UT 84107
(801)269-2730

Name: ARMSTRONG, JARED T
DOB/SEX: 07/25/1980, 15Y M
Pat#:

Case#: SC4731-96
Hosp#: 958971
Acct#: 72005036
Loc : SURGICAL CENTER

Pathologist: Heinig, Donald W. M.D.
Physician: Bindrup, Jed Reed M.D.

Procedure Date: 7 18 96
Accession Date: 07/18/96

FINAL DIAGNOSIS: SKIN, FACE - SCAR.

CODED DIAGNOSIS: 49060

PRE-OP DIAGNOSIS: FACIAL SCARS

TISSUE: FACIAL SCARS

GROSS:

Received are four ellipses of skin all measuring approximately .7 x .4 cm. The entire specimen is submitted.

DH:kr

MICRO:

Sections of all of the skin lesions demonstrate epithelium with loss of rete ridges. There is dense collagen in the dermis. Some inflammation is also present.

DH:ml
July 19, 1996

JRB

Signed: _____ M.D.
Pathologist

Jared
Armstrong

JUN 1 0 1995

15 yo ♂ involved in MVA 4/96. Now presents for scar revision of face. Pt feels these look like "big zits".

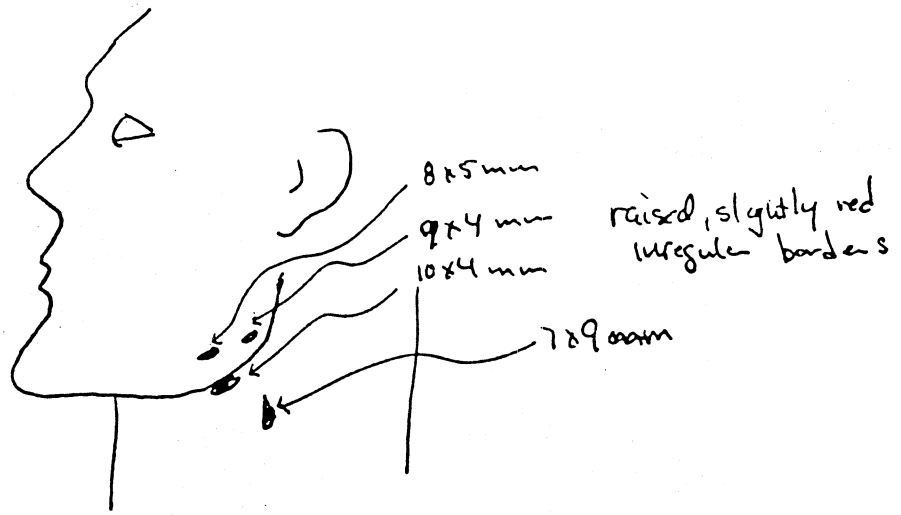
PMHx - surgeries - ⊖ broken fx — meds - ō

medical - NC preemie — Allergies - NKDA

SHx - Students, lives ō parents

(-) tobacco

Exam:



Imp: post-injury scarring to ⊖ face

Plan: Discussed ē pt & father the timing of revision, the procedure, risks & benefits. Questions answered Handouts given

Will schedule 1/97 so pt can resume sports after repair

Brad

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

DANIEL J. ARMSTRONG, JARED ARMSTRONG, TAYLOR ARMSTRONG BY LORENE ARMSTRONG, HIS GUARDIAN AD LITEM,	)	
Plaintiff,	)	Civil No. 980908711
vs.	)	
GLEN C. PICKETT AND JOHN DOES 1-5,	)	Judge Homer F. Wilkinson
Defendant.	)	

* * * * *

Telephone Deposition of

JARED TROY ARMSTRONG

October 9, 2000

* * * * *

Telephone deposition of JARED TROY ARMSTRONG, taken on behalf of Plaintiffs, at 935 East South Union Avenue, Suite D-102, Midvale, Utah, commencing at 10:10 a.m. on October 9, 2000, before Lillian S. Hunsaker, Certified Shorthand Reporter and Notary Public in and for the State of Utah, pursuant to Notice.

* * * * *

A P P E A R A N C E S

For the Plaintiffs: ROBERT H. WILDE
Attorney at Law
935 East South Union Avenue
Suite D-102
Midvale, UT 84047

For the Defendants: Steven B. Smith
SCALLEY & READING
Attorneys at Law
261 East 300 South, Second Floor
Salt Lake City, UT 84111

Also present: Daniel Jon Armstrong
Lorene Armstrong

I N D E X

EXHIBIT MARKED FOR IDENTIFICATION

* * * * *

MIDVALE, UTAH, MONDAY, OCTOBER 9, 2000, 10:10 A.M.,

* * * * *

MR. WILDE: Hi, Jared. Bob Wilde. How are you?

THE WITNESS: Fine.

MR. WILDE: As your dad says, we have got Steve Smith, who is the attorney for the other side, along with your mom and dad, and Lillian Hunsaker, who is the court reporter.

THE WITNESS: All right.

MR. WILDE: What we're going to do is put you under oath, and then I'm going to ask you some questions, and Mr. Smith will ask you some questions; I may ask you some more, and so on.

We don't think this is going to take very long. But we do need to have you answer in English.

Have you got a copy of that picture that you took for us?

THE WITNESS: I do.

MR. WILDE: Okay. Why don't you go ahead and raise your hand, and Lillian is going to swear you in.

JARED ARMSTRONG,

called as a witness at the request of Plaintiffs, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WILDE:

Q Would you tell us what your name and address is.

A My name is Jared Troy Armstrong; I live at Avenita Cruz De Campo, Building Number 21, 5th Floor, Room Number A.

Q What city is that?

A That's Seville, in the country of Spain.

Q How long have you been in Spain?

A I have been in Spain for one year.

Q How long are you planning on remaining in Spain?

A For another 10 months at least.

Q Do you recall an automobile accident that you were involved in?

A I do.

Q And you have provided us a copy of a picture which was recently taken?

A I did.

Q Where did that picture get taken? Tell us the circumstances under how that picture was taken.

A I was informed by my father that I needed to revise some pictures of the scars from the accident. And I went through a professional photographer who had

a studio here in Seville, Spain, and I asked him to take some close-up pictures of the scars. And he took several pictures; and these are the ones he gave me.

Q And then you sent those to your father; is that correct?

A I did.

Q Now, as I look at it, it appears that what we're looking at is your chin and your neck on the left side; is that correct?

A That's right.

Q Okay. We're going to mark a copy of that picture here as an exhibit to your deposition. So let's take just a minute and let Lillian do that.

(Whereupon, Plaintiffs' Exhibit Number 1 was marked for identification.)

Q (By Mr. Wilde) All right; we have marked a copy.

These scars, where did they come from? What injuries caused those?

A I believe they came from my head going through the side window.

Q All right. Did you have scars or injuries to your face there prior to this accident?

A I did not.

Q What was done to make those scars look

better, if anything?

A Well, we went to the plastic surgeon who-- I went in for surgery by him. And, supposedly, he corrected the scars in the manner that he deemed fit.

Q And, now, as we look at them, it looks to me like there's one that's on your left jaw, and another on your throat, and another that's just slightly above the one on the bottom of your jaw. Is that a fair statement?

A That's correct.

Q Are you aware of any other scars or injuries to you as a result of this accident?

A Yes. They are very minor and not visible.

Q Describe those for us.

A I have two on my left arm--on my biceps--and they're in a similar manner and shape and color as these, but not as visible.

Q What, if anything, do you recall about that collision that gave you the scars?

A Well, I received a concussion, and I do not remember the collision in any way, shape or form. I remember being loaded in the ambulance, and I remember--slightly before the accident--traveling the road; but I remember nothing of the accident.

MR. WILDE: I don't have any more questions.

MR. SMITH: I have a few questions for you, Jared.

THE WITNESS: All right.

EXAMINATION

BY MR. SMITH:

Q Have you done anything to prepare for this deposition today?

A I have not.

Q Other than take photographs?

A Other than that; no.

Q How many photographs did you have taken?

A They took three photographs, but the photographer only gave me one.

Q Okay. And that is the one you sent to your father?

A That is right.

Q Other than these scars on the left side of your face and neck, did you suffer any other injuries from this accident?

A On the left side of my body, I received two cuts on my biceps--and I also recorded those scars just now--and other than that, just a few bruises and bumps; and the concussion, as I said.

Q Okay. And you recovered from the bruises and bumps?

A Yes, I did.

Q Did they limit you in any way?

A The bruises and bumps and scars, no, other than.... No, they did not limit me in any way.

Q How do the scars affect you now?

A I just look in the mirror and I see them, and I wish they weren't there.

Q Is that why you had surgery?

A That's why we had surgery.

Q Do you have an opinion about whether or not that surgery helped the scarring?

A I believe it did. Before, the scars were raised and inflamed. And I believe it had been almost a year before the surgery was performed or--at least a considerable amount of time--and the scars hadn't subsided at all, and there was swelling and so on. And after surgery, they were fairly flat, and they appear much less prominent.

Q Do they cause any physical discomfort for you?

A No, they don't.

Q You just see them and you don't like them?

A Yes.

Q Do they impact shaving at all?

A I did not hear that.

Q Do you have to shave?

A Yes, I have to shave.

Q Do they impact how you have to do that?

A Well, I cut myself, anyway. But shaving, they seem to be cut in the amount of times or in the frequency as the rest of my face.

Q So you don't believe they present any problem-- Do they present any other problems to you other than the fact that you don't like them?

A No, they do not.

Q Do you have any other scars on your body from any other accidents?

A I do, but they are not related.

Q What other scars do you have?

A I have a scar on my forehead from when I was three or four. I have a scar on my lower right leg--an A.T.V. accident--about five years ago. And a few other scars. On my thumb, I have about three. A bike accident, on my elbow, about seven years ago.

Q Other than the surgery to revise the scars by Dr. Bindrup, have you had any other surgeries?

A I did. I had my left hand--I had broke a bone, metacarpal--the fifth metacarpal--in a fight, and the doctor pinned the bone in place.

Q Do you have any scarring from that?

A I do not.

Q Any other hospitalization? Any other times you have been to the emergency room?

A Apart from the other scars that I mentioned on my lower leg?

Q Yes.

A I received stitches for that. And recently; no.

Q What do you mean? What is your definition of "recently"?

A Well, I guess I went to the hospital a month or two ago for a strained wrist; but other than that, I haven't been in the hospital for three years--three, four--well, since the accident, really.

Q You went to the emergency room after the accident; is that correct?

A I did. Are you referring to that time--

Q The traffic accident.

A When the ambulance took us?

Q Yes.

Do you remember when that happened?

A When the ambulance took us?

Q Yes.

A It was immediately after the accident. It was on January 6th, I believe.

Q And that was 1996?

A It was.

Q What other treatment have you received because of injuries you received in the accident? You went to Dr. Bindrup for two visits?

A Yes, I believe so.

Q Anything else?

A The emergency room. And that's it as far as seeing a physician about it.

Q Have you ever been involved in any other lawsuits?

A I have not.

MR. SMITH: I think that's all I have.

FURTHER EXAMINATION

BY MR. WILDE:

Q Jared, this picture that you have, does that correctly depict the current state of your face?

A It does.

MR. WILDE: I don't have any other questions.

Jared, I appreciate it. Your mom and dad wish they could talk to you more, but they can't.

LORENE ARMSTRONG: We love you.

MR. WILDE: Go back to work.

DAN ARMSTRONG: Work hard.

THE WITNESS: All right. Will do.

MR. WILDE: Thanks.

(Whereupon, the deposition proceedings were concluded at 10:35 a.m.)

* * * * *

WITNESS CERTIFICATE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, JARED TROY ARMSTRONG, having been duly sworn, hereby attest and verify:

That I am the witness referred to in the foregoing deposition and that I have read the foregoing testimony, making any changes/corrections I deem necessary, and the same truly and accurately reflects my testimony.

That any changes/corrections I deem necessary I have made in ink on the correction sheet attached hereto as Page 15, giving my reasons therefor and affixed my initials thereto.

_____
JARED TROY ARMSTRONG

Subscribed and sworn to at Salt Lake County, Utah, this_____ day of _____ 2000.

_____
Notary Public
Residing in _____

STATE OF UTAH)
: ss.
County of Salt Lake)

I, LILLIAN S. HUNSAKER, C.S.R. and Notary Public for the State of Utah, residing in Salt Lake County, certify:

That the deposition of JARED TROY ARMSTRONG was taken telephonically at the time and place herein set forth, at which time the witness was by me duly sworn to testify the truth.

That the testimony of the witness and all objections made and all proceedings had of record at the time of the examination were reported by me and were thereafter transcribed into typewriting under my direction, and I hereby certify that the transcript is a full, true and correct record of my notes taken.

I further certify that I am not of kin or otherwise associated with any of the parties herein or their counsel, and that I am not interested in the events thereof.

IN WITNESS WHEREOF, I have subscribed my name and affixed my seal this 10th day of October 2000.

Lillian S. Hunsaker

LILLIAN S. HUNSAKER, Certified Shorthand Reporter and Notary Public for Salt Lake County, State of Utah

LILLIAN S HUNSAKER
Notary Public
State of Utah
My Comm. Expires Nov 13, 2001
South [illegible] City UT 84094

CORRECTION SHEET

Deposition of JARED TROY ARMSTRONG

Case No. 980908711 Taken on: October 9, 2000

Page-Line	Correction	Reason	Initials

There are no corrections to be made in transcript._____
(Initials)

Plaintiffs' Exhibit Number 1

Dated: 10-9-00 lsh